DOCUMENT RESUME

ED 072 502 CS 500 151

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TITLE Counterads: Broadcasting and the First Amendment.
PUB DATE Dec 72
NOTE 10p.; Paper presented at the Annual Meeting of the Speech Communication Assn. (58th, Chicago, December 27-30, 1972)

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS Broadcast Industry; Federal Court Litigation; *Freedom of Speech; *Government Role; *Mass Media; *Programing (Broadcast); Publicize; Radio; Television; *Television Commercials
IDENTIFIERS *Counteradvertising

ABSTRACT

The author claims that one of the results of the pressure put on broadcasting to increase its availability as a discussion forum is the development of "counteradvertising," editorial advertising that involves the broadcasting of opinion on controversial issues. This is an outgrowth of the FCC ruling that broadcasters provide free time for anti-cigarette statements. The courts have been faced with controversies on the extent to which broadcasters must accept counterads, which might undercut the advertising base of the industry, versus the "right of reply" of citizens groups to diverse topics. The author raises three issues that are involved: the extent to which editorial advertising can logically be extended, the price of counteradvertising and the proportion of counterads to a given commercial, and the effect of counterads as a prior restraint that would force stations to reject some advertising. (Author/RN)

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ED 072502

COUNTERADS: BROADCASTING AND THE FIRST AMENDMENT

A Paper

Presented To

The 1972 Convention Of The

Speech Communication Association

by

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A major problem has confronted broadcasters in recent years, that of counter-advertising. The phenomena was born when John F. Banzhaf petitioned the FCC for a ruling that cigarette advertising purportedly implied the healthfulness of smoking and required the broadcaster under the fairness doctrine to broadcast statements to the contrary. The FCC upheld the claim and ordered broadcasters to give free time for anti-cigarette messages.[1] Now, some five years later, the FTC and consumer groups have asked that counter-ads be applied to questions about the environment[2] (Friends of the Earth), the role of women in society[3] (Women for Peace), and the Vietnam war[4] (Business Executives' Move for Vietnam Peace). The controversy is complex and answers are few. The basic question, however, is whether stations as a matter of policy may refuse to sell advertising time to groups wishing to convey their viewpoints on controversial subjects. The FCC and broadcasters believe that the First Amendment is satisfied when stations comply with the fairness doctrine by presenting programs with conflicting views.[5] Opponents claim that it is the right of the individual to speak his own views directly to the audience that is protected. The issue involves two complex First Amendment questions. One relates to access to the airwaves, the other to the First Amendment status of broadcast advertising. Since the Supreme Court has agreed to hear the issue this term, it is the purpose of this paper to examine some of the First Amendment issues with which it must deal.

ACCESS

The question of access is similar to fairness but with significant differences. A broadcaster can satisfy the fairness doctrine when he puts on a program adequately reflecting a viewpoint in opposition to the one previously broadcast. The broadcaster thus retains control of the program content and the selection of the rebuttal speaker. One who claims a right of access, on the other hand, argues that there is a constitutional interest in his particular voice being heard over the air whether the licensee agrees with his opinion or not.[6] Recent court cases reflect a shift in focus from the rights of licensees to the rights of speakers who have been denied access to the airwaves. As the Supreme Court wrote in the famous Red Lion decision, the fairness doctrine not only includes a right to command time, but requires it.[7]

> It is the right of the viewers and listeners, not the right of broadcasters, which is paramount. . .It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to coutenance monopolization of that market, whether it be by the Government itself or a private licensee. . .It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas which is crucial here.[8]

In the BEM case, which the Supreme Court will hear this term, the Court of Appeals held that the First Amendment barred licensees from refusing to

sell advertising time to groups desiring to present controversial issues. Expanding on the Red Lion theme, the Appeals Court concluded,

> . . .the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoint, but also to present them in an unhibited, wide-open fashion and to provide opportunity for individual self-expression.[9]

The Court remanded the matter to the FCC to formulate a reasonable regulatory scheme but also reinforced the notion that rights of the speaker is more important than the rights of the licensee.

FAIRNESS AND ADVERTISING

While the right of access seems to enjoy constitutional protection in the courts, the constitutional status of advertising messages is far less clear. The question that remains unanswered is whether commercial messages enjoy First Amendment protection or whether they can be subjected to rebuttals in the form of counter-ads. Three issues exist in the problem.

The first is the number of counter-ads that would be needed to rebut a given commercial message. Anti-cigarette spots were broadcast about one to every five cigarette advertisement. FCC Commissioner Nicholas Johnson has suggested that twenty per cent of the time now used for commercials--2 to 4 minutes per hour--should be available on a first come, first served basis for counter commercials.[10] The National Citizen's Committee for Broadcasting suggests that twenty per cent of available advertising time be set aside for rebuttals, and that all time be available for sale for

editorial ads and that counter commercials follow the original ad immediately when possible.[11]

It is obvious that the implementation of counter advertising demands some system of rationing the available time. As Harvard law professor Louis L. Jaffee cautions in his study of the anti-cigarette campaign:

> Its logic can be expanded to justify so many demands for free time as to threaten broadcaster's advertising base. It can be argued that almost all advertising places a product in its most favorable light and does not communicate its significant and controversial contervailing costs.[12]

Moreover, there is the problem that the rich or most aggressive would hog the available time. As FCC Chairman Dean Burch put it, editorial advertising is "the power of the purse, pure and simple."[13]

Beyond that is the burden on the licensee. If he must make "some" time available for counter ads, he cannot control potential fairness claims as he can an ordinary commercial. He must be wary of which claims will place demands on his most precious resource, advertising time. The small station in particular may not be able to afford to offer rebuttal time. If counter-ads bring fairness obligations, and the First Amendment demands some rebuttal time, the number of spots might have to be limited by some quota, perhaps graded to a stations profit level.[14] In the end, it boils down to balancing the gain for public enlightenment against the threat to revenue, and at this moment advertising does support most broadcasting.

The second problem is how to determine which issues deserve counter advertising. The constitutional problems in developing such standards would

be significant. Under the Fairness doctrine, the licensee makes the initial determination of whether a controversial issue has been raised. The absence of adequate standards to help him determine what is "controversial" permits results which are inconsistent and even arbitrary. Nor is FCC review likely to correct inconsistency. The Commission's examination is limited to a determination of whether the licensee's decision was reasonable and made in good faith.[15] Reasonableness cannot be judged by any objective criteria. The result is that the licensee is left in the vague position of not knowing when a commercial is "controversial," when a counter-ad is required, or who should give it if it is justified. The BEM court noted that equal protection and First Amendment principles "condemn any discrimination among speakers which is based on what they intend to say."[16] Faced with these considerations, it is likely that many licensees will follow the lead of WNBC-TV in the Friends of the Earth case. Instead of fighting the case to conclusion, with the help of the FCC, the station agreed to run a series of ads prepared by the New York Environmental Protection Agency countering auto and gasoline commercials.[17] Against the challenge of well-funded consumer groups stations can be expected to sacrifice their rights against the threat to revenue.

The third issue is perhaps the most sensative. If broadcasters are required to provide some quota of counter ads to advertisements deemed controversial, does this imply that commercial advertising is considered an inferior form of expression not protected by the First Amendment? In the view of Senator Sam Ervin, this is the case, and the courts have developed a theory which distinguishes between "commercial speech" and other forms of speech, giving greater constitutional protection to the latter. As he put it:

> In general, the courts have adopted and applied a First Amendment theory distinguishing between "commercial" speech and other speech on the basis of an asserted difference in the social purpose and value of these types of speech. They have determined that "commercial speech" is designed simply to entice consumers to purchase services or products and that it does not serve the same high social purpose as does speech which advocates a certain political or religious position, presents general information, or involves the dissemination of culturally valuable matter.[18]

Though Senator Ervin stipulates that the courts have not elaborated on this theory, the basic point seems to hinge on whether profit motivation or the desire to influence private economic decisions necessarily distinguishes the peddler from the political advocate. For example, simple advocacy of revolutionary actions is protected by the First Amendment although actual incitement to overthrow our government can be made the subject of criminal prosecution. The implication seems to be that commercial speech is not part of the "marketplace of ideas" and not open to rebuttal. Rather, it is speech that serves an economic function, one that the First Amendment is not meant to consider.

CONCLUSION

It is difficult to look too far into the future, especially with the Supreme Court about to consider counter-ads. Still, the court has taken a fairly consistent stand that the First Amendment requires certain obligations

of broadcasters because of the scarcity of frequencies, and because stations are licensed in the "public interest." As a result of the Red Lion decision the fairness doctrine already exists as a qualified right of rebuttal and it can be expected that some sort of allocation of broadcast time among the public will be adopted.

I do not envision any objective criteria for selecting the rebuttal speakers. Such criteria would be almost impossible to formulate, let alone gain approval. It is likely that the broadcaster will be given very large discretion in the rationing of counter commercials, of deciding what groups are representative and how much air time should be devoted to any one subject. The FCC, then, will have to establish some "fairness" policy for the placement of counter-ads.

I do not see the imposition of such a policy as a detriment to broadcasting. Many stations are already setting aside periods of free access, though not necessarily for counter-commercials. Broadcasters can provide gains in public enlightenment without the imposition of a forced access. To say "no" to all ideas is to invite a fixed demand for reply time.

Also, I do not necessarily see commercial speech as being interpreted as inferior speech. It is true that the First Amendment does not specify any particular type of expression that it is to protect, but to say that it requires some counter-ads is not necessarily to say such speech is inferior. The goal is to use broadcasting to facilitate the flow of ideas and if anything the BEM case seems to be moving away from a right of rebuttal toward a right to initiate ideas in the broadcast media. This right may well involve free access, some paid counter-ads, or both. In any event, it does not seem to place a lower status on the constitutional

value of commercial messages. It simply seems to bring such speech into the realm covered by the First Amendment.

Some concept of "advertising fairness," initiated by the FCC, seems likely. It is hoped that such an influence on broadcasters will not have a chilling effect on communication and it need not if counter-commercials are not tied to license renewals. It is the fear of license revocation that concerns broadcasters most. To run a reasonable proportion of counter-ads is certainly a lesser evil than license revocation.

FOOTNOTES

1. Banzhaf v. FCC, 405 F .2d 1028 (D.C. Cir. 1968, cert. denied, 396 U. S. 842 (1969). .

2. Friends of the Earth v. FCC, 449 F .2d 921 (1967).

3. Women for Peace v. FCC, 24 F.C.C. .2d 156 (1970).

4. Business Executives' Move for Vietnam Peace v. FCC, 450 F .2d 642 (D.C. Cir. 1971), petition for cert. filed, 40 U.S.L.W. 3317 (Jan. 11, 1972).

5. The fairness states that the broadcaster must give adequate coverage to public issues and that it must fairly represent opposing views. See Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

6. Note: A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access, 39 George Washington Law Review, 532, 557 (1971).

7. Red Lion Broadcasting Co. v. FCC 395 U.S. 367, 390 (1969).

8. Ibid.

9. Business Executives' Move for Vietnam Peace, 40 U.S.L.W. 2082 (1971).

10. Democratic National Committee v. FCC, 25 F.C.C. 2d 216 (1970).

11. Reply comments of NCCB Submitted to the FCC in Docket No. 19,260--Fairness Doctrine, pp. 2-3.

12. Jaffee, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harvard L. Rev. 768, 775 (1972).

13. Broadcasting, April 5, 1971, at 40.

14. The Editorial Responsibility of the Broadcaster, Ibid. p. 787.

15. Editorializing Report 1249-52.

16. Business Executives' Move for Vietnam Peace, at 33.

17. "Counter ad agreement on Auto, gasoline spots may erase FCC's case, Advertising Age, October 12, 1972, p. 1.

18. Ervin, Senator Sam J. (Speech Before the Proprietary Association Annual Meeting, White Sulphur Springs, West Virginia, May 16, 1971).